

## SB 180 – STATE ETHICS COMMISSION BILL (Sec 11-49-101)

### Recommendations

*In anticipating the enactment of county ordinances to reflect the provisions of the State Ethics Commission law (SB180 – UCA 11-49-101), several goals were pursued which include: complete transparency and a prompt and responsive reporting system, minimizing the burden on a person reporting misconduct, broad jurisdiction, minimizing county costs, and referral for resolution to those county agencies with either legal jurisdiction or subject matter expertise regarding complaints of misconduct. As the county proposal was drafted and pursued, there were concerns that the approach did not closely follow the provisions of the state law as expressed in SB180. Careful review of the bill brought up the following questions.*

**-1 Does SB180 have broad enough jurisdiction to cover a variety of misconduct complaints?** The statute establishes the state body's jurisdiction as limited to complaints of violations of the County Employees' Disclosure Act. That act only addresses a very limited list of types of misconduct, including disclosure of confidential information, getting special privileges or exemptions, gifts or loans that may tend to influence, and failure to file a disclosure statement when an employee accepts payment for helping someone with a county transaction or is involved with a business that is regulated by the county, which does business with the county, or which creates a conflict of interest. See sections 11-49-102(3), 49-501(3)(c), and others. There are many other complaints or questions of ethical violations or misconduct coming from the public which would remain unaddressed by this limited jurisdiction.

The statute applies only to misconduct by county elected officials or by an appointed county manager. It has no application to other employees. Sections 11-49-102(6) and 102(8), 49-301(1), 49-501(3), and others. Complaints about misconduct in the county work-place include all employees and officers. Also, there appears to be an inadvertent inconsistency on this point – sec 11-49-301(1)(b)(i) seems designed to bring rank and file employees under the commission's jurisdiction.

The statute requires the ethics commission dismiss any complaints that may be subject to criminal prosecution or refer such complaints to the prosecutor. Any misconduct under the county disclosure act can be charged as a class 'A' misdemeanor. Section 11-49-302(2)(b)(ii), 49-705. Based on this limitation, the narrow jurisdiction of the bill is reduced even more.

**-2 Does SB180 place too big a burden on a complaining citizen to initiate and pursue a complaint of misconduct?** While the law requires a complainant to file a formal complaint, and this has the effect of giving some assurance that complaints must be serious and verified, the statute seems to require a complainant to hire or become a private prosecutor. Just the initial requirement for a formal complaint may discourage some otherwise bona fide complaints and may make some citizens think they need legal assistance. At one point the law sets responsibilities on the "plaintiff" but never says who that is. It is unclear whether the duties of subpoenaing witnesses or even determining the order witnesses testify are performed by the commission or by the complainant. Section 11-49-404(2), 49-405(1), 49-406(3) and others.

**-3 The law requires the local government to take sides with an officer or employee who is accused of misconduct, even in the face of convincing evidence of misconduct.** When a complaint is filed with the commission, the respondent (a city officer, for instance) is treated as being sued under the Governmental Immunity Act and is entitled to city-provided counsel if he requests representation timely and the ethical misconduct was in the performance of duties, scope of employment or color of authority. Local governments would balk at the suggestion that ethical misconduct would fit that standard. Section 11-49-408(2)(b). Rather

than being forced to side with an employee or official who engages in misconduct, local governments would prefer to clean their own houses.

**-4 Does SB180 include a loophole an unethical officer or employee can use to escape the scrutiny of the state commission?** The confidentiality of the complaint process is strongly emphasized throughout the new law, and a complaint will be dismissed if privacy is breached. It appears possible that an accused person could exploit this privacy protection himself and reveal the ongoing investigation, thereby requiring dismissal of the investigation. Section 11-49-502(3). In addition, the parts of the law mentioned above at point 3 require the accused person to reveal the existence of the investigation in order to receive representation and indemnification from the local government employer.

**-5 SB180 limits the local government's ability to investigate and resolve its own internal problems.** The statute provides in several places that the commission is required to inform the local government when a complaint is filed against one of its officers, but it prohibits the commission from giving any names or other particulars about the complaint or who it is lodged against, effectively precluding the city or county from cleaning its own house. Section 11-49-601(2)(a)(ii) and 601(2)(3)(c), 49-602(6)(b), and others.

**-6 Does SB180 put too much emphasis on providing due process protections in what is only an investigation and recommendation process?** The statute provides considerable due process hearing protections for the respondent, but it has no power to discipline or terminate a guilty respondent; it can only make recommendations to the local government employer. There seems to be no good reason to provide a due process hearing if the result is only a recommendation after an investigation. Recommendations can include termination or judicial removal for misconduct, but both those would require entirely new due process hearings, de novo. Section 11-49-703(3)(a). When a local government acts on a commission's recommendation, it is required to file a judicial removal action or criminal charges against the accused; that process would include full due process protections. Likewise, terminating a merit employee, based on the commission's recommendation, would also result in a due process hearing for the accused employee. Having due process in this investigation is similar to requiring a police officer to provide a due process hearing for a suspect.

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